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Nos. 88-1198 and 88-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,
v.
FEDERAL TRADE COMMISSION,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

1. Whether the First Amendment protects the right of a professional association and its members to engage in an expressive boycott designed to publicize and enlist political support for a legislative increase in the rate of reimbursement for members' services.

2. Whether an expressive boycott may be condemned under the antitrust laws without proof that the participants had market power, *i.e.*, that they had the capacity to cause any actual harm to competition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
Table of Contents	iii
Table of Authorities	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF A PROFESSIONAL ASSOCIATION AND ITS MEMBERS TO ENGAGE IN AN EXPRESSIVE BOYCOTT DESIGNED TO PUBLICIZE AND ENLIST POLITICAL SUPPORT FOR A LEGISLATIVE INCREASE IN THE RATE OF REIMBURSEMENT FOR MEMBERS' SERVICES	10
A. The SCTLA's Activities Involved a Matter of Public Importance	11
B. Collective Action by the SCTLA Lawyers Was Essential to Effective Advocacy	13
C. The SCTLA's Activities Represented A Genuine Attempt to Influence Governmental Action	14
II. THE MARKET POWER OF THE PARTICIPANTS IN AN EXPRESSIVE BOYCOTT MUST BE ASSESSED TO AVOID PENALIZING PROTECTED CONDUCT THAT MAY NOT BE HARMFUL TO COMPETITION	17
CONCLUSION	27

TABLE OF AUTHORITIES

Cases:	Page(s)
Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	4
Board of Trustees v. *Fox*, 57 U.S.L.W. 5015 (June 27, 1989)	21
Buckley v. *Valeo*, 424 U.S. 1 (1976)	13
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)	20
Carey v. *Brown*, 447 U.S. 455 (1980)	11
Citizens Against Rent Control v. *Berkeley*, 454 U.S. 290 (1981)	13
Clamp-All Corp. v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989)	20
Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984)	8, 21
Consolidated Metal Products, Inc. v. *American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988)	20
Costello Publishing Co. v. *Rozelle*, 670 F.2d 1035 (D.C. Cir. 1981)	13
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)	*passim*
Frisby v. *Schultz*, 108 S. Ct. 2495 (1988)	21
FTC v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986)	24
George Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970)	17
In re Michigan State Medical Society, 101 F.T.C. 191 (1983)	24
Jack Walters and Sons Corp. v. *Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984)	21

TABLE OF AUTHORITIES—Continued

Cases:	Page(s)
Jefferson Parish Hospital Dist. No. 2 v. *Hyde*, 466 U.S. 2 (1984)	18
Meyer v. *Grant*, 108 S. Ct. 1886 (1988)	13
Mount Healthy City School Dist. Board of Education v. *Doyle*, 429 U.S. 274 (1977)	12
NAACP v. *Alabama*, 357 U.S. 449 (1958)	13
NAACP v. *Button*, 371 U.S. 415 (1963)	22
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 885 (1982)	3, 11, 22
NCAA v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984)	18
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	3, 22
Osborn v. *Pennsylvania-Delaware Service Station Dealers Ass'n*, 499 F. Supp. 553 (D. Del. 1980)	19, 22, 24
Parker v. *Brown*, 317 U.S. 341 (1943)	25
Roaden v. *Kentucky*, 413 U.S. 496 (1973)	22
Spence v. *Washington*, 418 U.S. 405 (1974)	7-8, 10, 12, 17
Texas v. *Johnson*, 57 U.S.L.W. 4770 (June 21, 1989)	8, 10, 12, 17, 21
Thornhill v. *Alabama*, 310 U.S. 88 (1940)	11
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	3, 15
United States v. *National Society of Professional Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd on other grounds*, 435 U.S. 679 (1978)	13

TABLE OF AUTHORITIES—Continued

Cases: Page(s)

United States v. *North Dakota Hospital Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986) 24

United States v. *O'Brien*, 391 U.S. 367 (1968) ..... *passim*

United States v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972) 20

United Transportation Union v. *State Bar of Michigan*, 401 U.S. 576 (1971) 13

Virginia State Board of Pharmacy v. *Virginia Consumer Council*, 425 U.S. 748 (1976) 18

Constitution and Statutes:

U.S. Constitution
Amend. I ..... *passim*

Sherman Act
15 U.S.C. § 1 ..... *passim*

Federal Trade Commission Act
15 U.S.C. § 45 5

D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 & 1988 Supp.) 2, 3

Miscellaneous:

American Medical Association, *Collective Negotiation and Antitrust: A Guide for Physicians* (1989). 24

1 P. Areeda and D. Turner, *Antitrust Law* (1978) . 16

7 P. Areeda, *Antitrust Law* (1986) 24

R. Bork, *The Antitrust Paradox* (1978) 26

Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65 (1985) 14, 26

Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131 (1980) 22

TABLE OF AUTHORITIES—Continued

	Page(s)
Note, *A Market Power Test for Noncommercial Boycotts*, 93 Yale L.J. 523 (1984)	22-23
Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659 (1978)	22-24
S. Rep. No. 790, 91st Cong., 2d Sess. (1979)	3

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

The American Medical Association respectfully submits this brief as *amicus curiae* in support of the Superior Court Trial Lawyers Association, *et al*. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 36.2.

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its membership exceeds 280,000 physicians and medical students.

The AMA is dedicated to promoting the public welfare through the maintenance of appropriate professional standards and the provision of quality health care. To this end, the AMA and its members participate in a wide range of educational, informational, and certification programs. The AMA also advocates policy positions on public issues that affect the quality and availability of medical care. In particular, the AMA regularly takes positions upon proposed legislation that would affect the care provided under government-supported medical benefits programs such as Medicare and Medicaid.

In this case, the Federal Trade Commission ("FTC" or "Commission") has challenged the activities of the Superior Court Trial Lawyers Association ("SCTLA"), a professional association of lawyers who represent criminally accused indigents in the District of Columbia courts. The SCTLA organized a collective refusal to accept new case appointments under the District's Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.), for the purpose of obtaining public and political support for a legislative increase in the hourly reimbursement rates paid to its members. The Commission has taken the position that the SCTLA's activities are entitled to no First Amendment protection and are properly condemned as a *per se* violation of the antitrust laws.

The AMA recognizes that preservation of this nation's trade freedom depends upon vigorous enforcement of the antitrust laws. It does not advocate strikes or boycotts by competitors collectively exercising market power. However, the AMA believes that the Commission's approach to this case shows insufficient regard for the First Amendment rights of professional associations and their members. The AMA's interest in this case is to support the right of professional associations to use effective means to express their views to the government, including their views on appropriate levels of reimbursement.

In the AMA's view, the court of appeals in this case struck an appropriate balance between the vital interest in unfettered competition and the "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The AMA therefore files this brief as *amicus curiae* to urge the Court to affirm the ruling of the court of appeals.[1]

STATEMENT

1. This case involves a boycott by a professional association of lawyers aimed at influencing District of Columbia officials to increase reimbursement rates for lawyers who represent indigent defendants in criminal cases. The boycott—or "strike" as it was referred to by the participants and the media —was organized by the SCTLA, a professional association of lawyers who accept case assignments under the District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.) ("the CJA"). The boycott was part of a larger, ultimately successful, political and publicity campaign to persuade the District of Columbia legislature that the CJA reimbursement rates were inadequate.

At the time of the boycott in 1983, fees for CJA cases had not been increased since 1970. The fees were set at $20 an hour for out-of-court time and $30 an hour for in-court time, with a per case maximum of $400 for misdemeanors, $1000 for felonies, and $1000 for appeals. Even at the time these rates were established in 1970, they were viewed as low. S. Rep. No. 790, 91st Cong., 2d Sess. 14-15 (1970). Justice Powell referred to the rates as "low

[1]This brief addresses the issues raised in the Commission's petition for certiorari, Case No. 88-1198. The AMA does not address the extent to which particular forms of political activity are entitled to categorical immunity from the antitrust laws under this Court's decisions in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or the *Noerr - Pennington* line of cases. *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

by American standards" and noted that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger* v. *Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). From the mid-1970s until the time of the boycott, a number of bar associations and judicial groups issued reports commenting upon the inadequacy of the rates and urging a legislative increase to ensure adequate representation for the indigent accused. 856 F.2d at 229; 107 F.T.C. at 534.[2]

In the summer of 1982, the SCTLA leadership began a lobbying campaign to increase the CJA compensation rates. *Id.* Their efforts included meetings with the Mayor of the District of Columbia, the Chief Judge of the Superior Court, and other District of Columbia officials. *Id.* at 535-537. Several of these officials stated privately that they believed an increase was warranted, but indicated that the lawyers "would have to generate the political support for it." *Id.* at 535.

In March 1983, D.C. Council Chairman Clarke introduced Bill No. 5-128 to raise the CJA rates to $35 per hour for both in-court and out-of-court time. Although SCTLA members lobbied on behalf of the bill, it soon became apparent that the bill lacked the support necessary for enactment. Support grew among the SCTLA members for dramatic action to publicize and gain political support for their campaign. At an SCTLA meeting of August 11, 1983, the lawyers voted to "strike"—*i.e.*, to continue to represent clients on existing matters, but to stop accepting new CJA appointments as of September 6 if no legislative action was taken by that date. 107 F.T.C. at 539.

The strike began as planned on September 6, 1983 and lasted for about two weeks. During that period, the SCTLA scheduled

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[2]The following citation forms are used in this brief: "856 F.2d" refers to the court of appeals opinion; "107 F.T.C." refers to the opinions of the administrative law judge and the Commission; "J.A." refers to the joint appendix filed in this Court; and "FTC Br." refers to the Commission's brief before this Court.

a series of events—rallies, picket lines, handouts of press kits, and newspaper and television interviews—designed to educate the public about the inadequacy of CJA reimbursement rates. *Id.* at 543. The strike enabled SCTLA to obtain widespread media coverage of the reimbursement issue. (*E.g.*, J.A. 900, 921-22, 934, 946, 954).

On September 16, 1983, ten days after the strike began, the Mayor wrote to Council member Rolark expressing his willingness to support Bill No. 5-128. The same day, Rolark and Council Chairman Clarke met with the SCTLA lawyers and advised them that they would support the bill. Chairman Clarke presented the bill as a "take it or leave it proposition," and indicated that nothing would be passed if the lawyers rejected it. 107 F.T.C. at 548. Three days later, the SCTLA voted to accept the $35 per hour rate. The D.C. Council then passed Bill No. 5-128 and the Mayor —stating that "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District"—signed the bill. (J.A. 961). On September 21, 1983, the SCTLA lawyers resumed accepting new appointments under the CJA. 107 F.T.C. at 548-49.

2. On December 16, 1983, the Commission filed a complaint against the SCTLA and four of its individual members alleging that the concerted refusal to accept new case appointments was an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.[3] Following a three-week hearing, an administrative law judge ("ALJ") dismissed the complaint. The ALJ concluded that, rather than being anticompetitive, the strike merely made it politically possible for District officials to imple-

[3]The Commission throughout the proceedings below relied on standards derived from this Court's cases interpreting § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, the AMA will discuss the issues in this case in terms of the Sherman Act.

ment an increase in reimbursement rates that everyone agreed were "woefully inadequate." 107 F.T.C. at 509.

On appeal from the ALJ's decision, the Commission held that the SCTLA boycott was a *per se* violation of the antitrust laws. The Commission rejected the SCTLA's argument that the political dimensions of the boycott made *per se* treatment inappropriate. In the Commission's estimation, the strike was indistinguishable from those naked restraints on price and output that have been condemned under the antitrust laws without examination of their actual competitive effects. *Id.* at 575.

Alternatively, the Commission held that the SCTLA strike failed a rule of reason test. In reaching this conclusion, however, the Commission did not (1) define a relevant market, (2) determine the lawyers' market share, or (3) make any specific findings regarding market power. 856 F.2d at 250. Notwithstanding the absence of such findings, the Commission concluded that the boycott had harmed competition, and that "a direct causal link" existed between the boycott and the D.C. Council's decision to increase fees. 107 F.T.C. at 578.

3. The court of appeals reversed and vacated the Commission's order and remanded for additional proceedings to determine whether the boycott participants had market power. The court found that, while the SCTLA's conduct was not entirely exempt from the antitrust laws, it "did contain an element of expression warranting First Amendment protection." 856 F.2d at 248. The court therefore applied the test for analyzing expressive conduct set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968).

Under that test, the court found, the Commission's application of a *per se* rule violated the requirement that any incidental limitation on First Amendment freedoms be "no greater than is essential" to the furtherance of a substantial government interest.

Although the court did not question that the government has a substantial interest in preventing unreasonable restraints of trade, it held that the Commission's *per se* approach swept more broadly than necessary to effectuate that interest. Further, the court held that an inquiry into market power was necessary to determine whether the increased rates were in fact the product of economic coercion rather than a successful political lobbying campaign. 856 F.2d at 251-52.

The court directed the Commission, on remand, to define a relevant market, to estimate the boycott participants' share of that market, and to assess the significance of that market share in light of other factors relevant to the exercise of market power. It further instructed the Commission to determine, if market power is present, "how much market power is sufficient to justify the condemnation of an expressive boycott." *Id.* at 252. "Clearly," the court concluded, "the First Amendment concerns implicated by expressive boycotts require that they not be condemned if their ability to harm competition is insignificant." *Id.* at 252-53.

SUMMARY OF ARGUMENT

In its decision below, the Commission attached no significance to the communicative purposes of the SCTLA boycott or the political context in which it occurred. It therefore perceived no necessity to tailor its analysis to avoid condemning competitively harmless expressive activity. The Commission treated this case precisely as it would a "naked price fixing boycott." FTC Br. at (i).

The First Amendment requires a more discriminating analysis, however. If examination of the entire "factual context and environment" of the case indicates that the challenged conduct is expressive, then the conduct must be evaluated under the applicable First Amendment standard of review. *Spence* v. *Wash-*

ington, 418 U.S. 405, 409-10 (1974).[4] Specifically, if the conduct is speech-related, then any governmental regulation of the conduct must be narrowly tailored to further a substantial government interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). It is therefore essential, at the outset, to determine whether the SCTLA boycott is an activity protected by the First Amendment.

1. For at least three reasons, the SCTLA's activities are entitled to First Amendment protection. First, the boycott involved a matter of critical public importance: the appropriate level of reimbursement for professionals offering publicly-supported legal services for the poor. The SCTLA's activities were intended to communicate the boycott participants' opinions regarding this issue and were reasonably understood as doing so by the media and general public. Such communication regarding matters of public concern implicates core First Amendment values.

Second, the boycott was essential for the SCTLA lawyers to express their views in an effective manner. Although boycotts can pose a threat of harm to competition, they are also a recognized form of group advocacy. A balancing test provides an appropriate method of accommodating the expressive value of certain boycotts, without insulating from antitrust scrutiny conduct that is demonstrably harmful to competition.

Third, the boycott represented a genuine attempt to influence governmental action. As this Court recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a representative form of government depends upon the free flow of information between the citizenry and its repre-

[4] *Spence* held that displaying the American flag with a peace symbol affixed "at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University" was expressive. 418 U.S. at 414 n.10; *see also Texas* v. *Johnson*, 57 U.S.L.W. 4770 (June 21, 1989) (burning flag as part of demonstration outside Republican National Convention held expressive); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming *arguendo* that sleeping in public park to dramatize plight of homeless was expressive).

sentatives. That the views communicated by the SCTLA boycott are consistent with the economic self-interest of the lawyers does not diminish, and in fact may enhance, the boycott's informational value. Even assuming that the boycott is not entirely exempt from antitrust liability under *Noerr*, the interests identified in that decision support an intermediate form of First Amendment protection for genuine petitioning activity.

2. Summary condemnation of the SCTLA boycott is inappropriate both as a matter of antitrust law and of constitutional law. According to basic antitrust principles, *per se* treatment is reserved for conduct that is manifestly anticompetitive. An expressive boycott, rather than being a "naked" restraint of trade, has the potential to enhance competition by improving the ability of a purchaser—in this case the District—to define and implement its purchasing objectives. Indeed, the SCTLA boycott may have performed the procompetitive function of informing District policymakers that they were purchasing a lesser amount or quality of CJA legal services than the public desired.

But even if the boycott were otherwise illegal *per se*, its First Amendment implications would require the Commission to measure the lawyers' market power before pronouncing their conduct unlawful. Because their conduct was expressive, any restrictions on the lawyers' activities must be "no greater than is essential" to the furtherance of a substantial governmental interest. *O'Brien*, *supra*, 391 U.S. at 377. Although the government has an important interest in preserving competition, that interest is not even called into play unless the boycott had a clearly demonstrated ability to harm competition—*i.e.*, unless the participants had market power. *Per se* rules may serve a secondary interest in administrative convenience, but that interest is not sufficient to justify the suppression of expressive activity that may not substantially harm competition. Stated another way, the overinclusiveness of the *per se* rule—its condemnation of some

procompetitive or competitively neutral arrangements—cannot be tolerated as applied to activities protected by the First Amendment.

The Commission's argument that a legislative increase in reimbursement rates constitutes sufficient evidence of competitive harm is also unavailing. As the court of appeals explained, in the context of an expressive boycott, it cannot readily be determined whether political or economic power is the cause in fact of a favorable governmental action. An inquiry into market power is necessary to determine, as a preliminary matter, whether the boycott participants *could have* restrained trade. To the extent that the increase enacted by the D.C. Council was the result of political factors rather than the exercise of market power, the SCTLA boycott should not be actionable under the antitrust laws.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF A PROFESSIONAL ASSOCIATION AND ITS MEMBERS TO ENGAGE IN AN EXPRESSIVE BOYCOTT DESIGNED TO PUBLICIZE AND ENLIST POLITICAL SUPPORT FOR A LEGISLATIVE INCREASE IN THE RATE OF REIMBURSEMENT FOR MEMBERS' SERVICES.

Whether particular conduct implicates the First Amendment depends upon "the nature of the . . . activity, combined with the factual context and environment in which it was undertaken." *Spence* v. *Washington*, 418 U.S. 405, 409-10 (1974). Examination of the entire record in this case indicates that the SCTLA's activities were "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment. *Id.* at 409; *Texas* v. *Johnson*, 57 U.S.L.W. 4770, 4772 (June 21, 1989). Three separate elements of the SCTLA's conduct warrant First Amendment protection: (1) the SCTLA's activities involved a matter of public importance; (2) collective action by the SCTLA lawyers

was essential to effective advocacy; and (3) the SCTLA's activities represented a genuine attempt to influence governmental action.

A. The SCTLA's Activities Involved a Matter of Public Importance.

The SCTLA's activities conveyed the lawyers' viewpoint regarding the appropriate level of reimbursement for lawyers who defend the indigent criminally accused. (J.A. 184). In the District of Columbia as in states and municipalities around the nation, the extent of the governmental commitment to fund basic services for the poor is a public issue of profound importance. Benefits programs involving legal services, health care, and housing are regularly the subject of debate in the pages of newspapers and magazines and the halls of state legislatures and Congress. Far more than the income of providers is at stake in these debates: The level of reimbursement affects both the availability and the quality of basic services for the poor. These debates therefore implicate fundamental national values.

Because debate on public issues "has always rested on the highest rung of the hierarchy of First Amendment values," *Carey* v. *Brown*, 447 U.S. 455, 467 (1980), this Court has taken particular care to ensure that conduct occurring in the context of a political conflict be regulated only to the extent necessary to further a substantial government interest. In *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), for example, the Court held that the State of Mississippi could not impose tort liability for the non-violent elements of a boycott organized by the NAACP and directed at local white merchants. A critical consideration in the Court's analysis was that the boycott was designed to dramatize the protestors' concern with racial prejudice, a matter of unquestioned public importance. *Id.* at 912; *see also Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940) (picketing to publicize views on "matters of public concern" held protected).

The plight of the SCTLA lawyers and their clients is clearly an important public issue. (J.A. 326-27, 389-90). Without adequate reimbursement, the SCTLA lawyers could be forced to cease providing representation for the poor. In particular, those SCTLA lawyers with the most skills and experience would face strong incentives to abandon their CJA practices and shift their attention to more lucrative areas of law. (J.A. 765). Other SCTLA lawyers might leave the practice of law entirely. As a consequence, the indigent accused in the District of Columbia could have difficulty securing adequate representation.

Moreover, the record demonstrates that the SCTLA's activities were both genuinely intended to draw public attention to these issues and reasonably understood as communicating the message. *Spence*, *supra*, 418 U.S. at 410-11; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. The SCTLA lawyers had been advised by public officials that, to obtain a legislative increase, they "would have to generate the political support." 107 F.T.C. at 535. They responded by organizing the refusal to accept new appointments as a dramatic means of calling public attention to the issue. By distributing leaflets and organizing rallies and picket lines, they actively solicited, and ultimately obtained, widespread media coverage. (J.A. 914-54). That the media and general public responded to the protestors' efforts confirms both that the boycott served "to make a statement on a matter of public debate," 856 F.2d at 250, and that it was perceived as doing so by the protestors' intended audience.[5]

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[5]Had the protest not involved an issue of public concern—if nothing more than the economic interests of the protestors had been at stake—presumably neither the media nor the public would have responded. *Cf. Mount Healthy City School Dist. Board of Education* v. *Doyle*, 429 U.S. 274 (1977) (radio coverage of controversy suggests that public issue is involved and that First Amendment standards apply). They surely would not have responded as they did, with widespread declarations of support and sympathy for the protestors.

B. Collective Action by the SCTLA Lawyers Was Essential to Effective Advocacy.

The SCTLA lawyers joined together for the purpose of expressing their views in a dramatic and forceful manner that no one of them could achieve individually. Yet it is precisely because the lawyers acted collectively that their conduct is being challenged as an antitrust violation. *See* 107 F.T.C. at 577. In analogous circumstances, this Court has consistently held that enforcement actions directed at group advocacy must be closely scrutinized to ensure that the participants' right to band together to "make their views heard on public issues" is not unnecessarily infringed. *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295 (1981).

Group association is protected "because it enhances 'effective advocacy.'" *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). As the Court explained in *Citizens Against Rent Control, supra*, "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." 454 U.S. at 294. The right of association enables individuals with shared interests to pool their resources to assert their views "as effectively and economically as practicable." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 580 (1971); *see Meyer* v. *Grant*, 108 S. Ct. 1886, 1893 (1988).

Boycotts in particular have been recognized as "a staple of political, as well as economic, activity." *Costello Publishing Co.* v. *Rozelle* , 670 F.2d 1035, 1050 (D.C. Cir. 1981). As the court of appeals observed, boycotts "have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." 856 F.2d at 248. To be sure, a boycott—in addition to enhancing the effectiveness of advocacy—may increase the threat of harm to competition. But that fact goes to the *weight* of the government's interest in forbidding the boycott and is not a reason for foregoing any and all First Amendment balancing. *See, e.g.*, *United States* v. *National*

Society of Professional Engineers, 555 F.2d 978, 984 (D.C. Cir. 1977) (striking down portion of antitrust decree on First Amendment grounds, because "more intrusive than necessary to achieve fulfillment of the governmental interest" in preventing future violations), *aff'd on other grounds*, 435 U.S. 679 (1978).

In this case, collective action was the only effective means available for the SCTLA's members to mobilize political support for a fee increase. By acting through their association, the lawyers were able to conserve financial resources while maximizing their ability to draw public and media attention to the reimbursement issue. Indeed, disinterested observers suggested to the SCTLA's leadership that collective action was the lawyers' only hope for obtaining a political result. 107 F.T.C. at 536. Moreover, by taking the concededly drastic step of withdrawing their services from the program, the lawyers were able to bring the issue to the attention of policymakers who had previously disregarded it. Because the SCTLA lawyers faced strong political, as well as economic, incentives to engage in the boycott, their "strike" is entitled to the same measure of protection generally accorded to group efforts to persuade.

C. The SCTLA's Activities Represented A Genuine Attempt to Influence Governmental Action.

The extent to which political versus commercial motivations propelled the boycott is a matter of vigorous dispute between the parties. *See* 107 F.T.C. at 586-88. Regardless of the underlying motivations, however, there can be no serious question that the one indispensable goal of the boycott was to secure the passage of legislation increasing the CJA reimbursement rate.[6] Because the boycott represented a genuine attempt to influence govern-

[6]*See* 856 F.2d at 242. Because the District's CJA rates are set by statute, the strikers simply "could not gain economically in the absence of favorable legislation." Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 116 (1985) [hereinafter "*Abuse of Governmental Processes*"] (citing this factor as one reason for affording First Amendment protection).

mental action, the First Amendment mandates that the antitrust laws be applied—if at all—with extreme caution.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a group of trucking companies sued a group of railroad companies and their public relations firm alleging that they had conspired to restrain trade in the business of long-distance freight hauling. The truckers maintained that the railroad companies had engaged the public relations firm to conduct a publicity campaign designed to "foster the adoption . . . of laws . . . destructive of the trucking business" and "create an atmosphere of distaste for the truckers among the general public." *Id.* at 129. The Court held that the Sherman Act did not prohibit this conduct, regardless of its anticompetitive purposes or effects. In so holding, the Court emphatically rejected the contention that the railroads' economic interest in conducting the campaign affected the scope of their petitioning rights:

> It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139; *see also United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

Noerr suggests that the SCTLA's activities may be entirely exempt from antitrust prosecution. Like the railroads in *Noerr*, the SCTLA's members joined together for the express purpose of

securing legislation. Moreover, like the railroads, the SCTLA did not confine itself to simple lobbying, but engaged in a broader effort to publicize its views and persuade the public to support them. The mere fact that the legislation would be economically advantageous to the members of the SCTLA does not preclude constitutional protection for their conduct. On the contrary, *Noerr* recognizes that economic self-interest may provide a powerful incentive for like-minded persons to gather and disseminate the essential "information upon which governments must act."

Noerr, however, does not directly address the situation presented in this case. As the Commission noted in its opinion, "[i]n the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the marketplace. . . . Here, the government is itself a player in the relevant line of commerce. . . ." 107 F.T.C. at 596. Because the District government was acting as a purchaser as well as a policymaker, the possibility exists that the SCTLA boycott could have resulted in *direct* harm to competition, even apart from the District's ultimate decision to enact legislation increasing reimbursement rates.[7] In these circumstances, a categorical exemption from the antitrust laws may not be appropriate. *See* 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 206 (1978).

This conclusion, however, does not imply that the governmental identity of the D.C. Council is, as the Commission concludes, irrelevant. 107 F.T.C. at 596. At a minimum, *Noerr* requires that the government's interest in pursuing an antitrust action against genuine efforts to influence a governmental purchasing decision, and the government's means of furthering that interest, be closely

[7]As explained in part II, *infra*, it cannot be determined whether the SCTLA's activities resulted in any harm to competition prior to assessing the market power of the boycott participants.

scrutinized to insure against unnecessary encroachments of First Amendment freedoms.[8]

* * * *

In short, the SCTLA's activities were "sufficiently imbued with elements of communication" to fall within the scope of the First Amendment. *Spence*, *supra*, 418 U.S. at 409; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. Viewed in context, the boycott was designed not merely to benefit the participants, but to galvanize public support for an important policy initiative. Expression of this nature, whether in the form of speech or conduct, is at the heart of the First Amendment's protection.

Plainly a civil action enjoining this conduct constitutes a direct and significant infringement of the SCTLA's First Amendment rights. Accordingly, the Court must determine whether, as the Commission concludes, an expressive boycott may be suppressed without regard for its actual competitive consequences.

II. THE MARKET POWER OF THE PARTICIPANTS IN AN EXPRESSIVE BOYCOTT MUST BE ASSESSED TO AVOID PENALIZING PROTECTED CONDUCT THAT MAY NOT BE HARMFUL TO COMPETITION.

The court of appeals showed enormous deference to the policies of the antitrust laws and the powers of antitrust enforcers. Despite having found that the SCTLA boycott "served, in part, to make a statement on a matter of public debate," 856 F.2d at 250, the court held that the boycott could be prohibited if its demonstrated economic effect was to suppress competition. The

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[8]This is particularly true where, as here, the government's purchasing decision involves a significant policy determination. *Cf. George Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). Unlike, for example, the purchase of office supplies or "a technical decision about the best kind of weld to use in a swimming pool gutter," *id.*, the setting of CJA reimbursement rates involves fundamental questions of public policy. *See* pp. 11-12, *supra*.

court merely required the Commission to prove, rather than to presume, competitive harm. *Id.* That accommodation of the relevant interests was clearly appropriate, both as a matter of antitrust and First Amendment principles.

1. Under ordinary antitrust principles, the SCTLA's activities should be examined under the rule of reason rather than a *per se* rule. *Per se* rules are to be invoked only "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents of the University of Oklahoma,* 468 U.S. 85, 103-04 (1984). "Only when there is very little loss to society from banning a restraint altogether is an inquiry into its costs in the individual case considered to be unnecessary." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde,* 466 U.S. 2, 33-34 (1984) (O'Connor, J., concurring).

The Commission had no basis in the record to conclude with confidence that the SCTLA's conduct was inherently anticompetitive. Just as the communicative elements of the boycott entitle the SCTLA lawyers to the protections of the First Amendment, so does the informational value of their message raise the prospect of procompetitive benefits. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976). In this respect, constitutional and antitrust law are in complete agreement.

Like private purchasers of a service, governments require information in order to establish a price that permits them to obtain the mix of service characteristics (primarily price, supply, and quality) that they desire. Setting the price at too high a level causes waste of economic resources; setting it too low may reduce the amount and quality of services provided. Information from suppliers may enable the purchaser to attain the optimal balance.

To be sure, the information that a purchaser needs to receive from its suppliers can generally be conveyed through means less

drastic than a boycott. But for governments, and perhaps some private purchasers as well, evidence of public reaction to the consequences of alternative pricing strategies may itself be essential information to consider in setting a price. As representatives of the people, governmental officials necessarily shape their purchasing objectives upon information concerning what their constituents want. A dramatic appeal for public and media attention may provide significant information regarding the public's desires. Thus, the SCTLA boycott may have performed the procompetitive function of apprising District officials that—contrary to their apparent assumption—the citizenry of the District supported, or at least did not oppose, a rate increase.[9]

By generating information regarding both the problems caused by underfunding of the CJA program and the public's response to those problems, the SCTLA boycott may have enabled the District to make needed adjustments in its price and purchasing requirements—to the benefit not only of the SCTLA lawyers and their clients, but the general public as well. In any event, the informational value of the SCTLA's activities raises a sufficient prospect of procompetitive benefits to render *per se* treatment inappropriate.[10]

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[9]Respondent Perrotta's testimony before the administrative law judge illustrates the point:

> [F]or all that the Mayor knew in advance, the [public] reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city. The reaction might have been the crime rate is already so enormous. . . . There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense. . . . [W]e never got an unkind word from anybody after the strike.

(J.A. 186-87).

[9]*See Osborn* v. *Pennsylvania-Delaware Service Station Dealers Ass'n*, 499 F. Supp. 553, 558 (D. Del. 1980) (applying rule of reason because

(Footnote continued on following page)

2. Even if antitrust principles considered in isolation supported application of a *per se* rule, the First Amendment implications of the SCTLA boycott would preclude a summary approach. In this regard, the logic of the court of appeals' analysis is unquestionably correct.

Once it is determined that particular conduct is entitled to First Amendment protection, *O'Brien* requires that any restrictions on the conduct be "no greater than is essential" to the furtherance of a substantial government interest. *O'Brien,* 391 U.S. at 377. The substantiality of the governmental interest in preserving freedom of competition cannot seriously be questioned. This Court has observed that the antitrust laws are "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 110-11 (1980) (citing *United States* v. *Topco Assocs., Inc.,* 405 U.S. 596, 610 (1972)). Thus, under the *O'Brien* test, an expressive boycott proven to result in significant competitive harm could be prohibited, notwithstanding its communicative value.

As the court of appeals explained, however, determining whether expressive conduct has any actual capacity to harm com-

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(Footnote continued from previous page)
expressive boycotts "are likely to follow other patterns and have other effects than more conventional forms of joint refusals to deal").

The court of appeals appeared to assume that, absent some degree of economic integration among the boycott participants, the boycott must be viewed as a "naked" restraint. 856 F.2d at 236. But courts have often recognized that horizontal competitors may combine to produce information that enhances the ability of the market to function in an efficient manner—even though (1) the information-producing activity can be characterized in some sense as a "boycott," and (2) the competitors have *not* integrated their economic operations. *See, e.g., Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute,* 851 F.2d 478 (1st Cir. 1988), *cert. denied,* 109 S. Ct. 789 (1989); *Consolidated Metal Products, Inc.* v. *American Petroleum Institute,* 846 F.2d 284 (5th Cir. 1988).

petition requires an inquiry into market power.[11] Without such an inquiry, it is impossible to know whether the governmental interest in preserving free trade is even implicated.[12] Although application of a *per se* rule may serve a secondary governmental interest in administrative convenience, that interest does not justify the suppression of expressive activity with indeterminate competitive effects. Accordingly, the Commission's failure to measure the market power of the boycott participants violates *O'Brien*'s admonition against restrictions that are not supported by a substantial governmental interest.

Viewed from a slightly different perspective, the Commission's *per se* approach runs afoul of a separate branch of the *O'Brien* test: the requirement that regulations of expressive conduct be narrowly tailored to the relevant governmental interest.[13] As this Court has explained, a regulation

> is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. *Schultz*, 108 S. Ct. 2495, 2502-03 (1988) (citations omitted). An expressive boycott with predominantly procompetitive or competitively neutral effects is not "an appropriately targeted evil." *Id.* Because the Commission's approach would indiscriminately sweep such activity within the same proscription as conduct that is demonstrably anticompetitive, it fails to provide the

[11] 856 F.2d at 249; *see also Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (market power "is a prerequisite to being able to restrain trade unreasonably").

[12] *Cf. Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4773 (government interest in preventing breach of peace not implicated by public flag burning as part of political protest, where record showed no actual threat of disturbance occurring).

[13] This Court has stated that *O'Brien*'s "no greater than is essential" formulation is equivalent to a "narrowly tailored" standard. *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5018 & n.3 (June 27, 1989); *see also Community for Creative Non-Violence*, *supra*, 468 U.S. at 298.

"precision of regulation" that the First Amendment commands. *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

a. The Commission's brief argues, apparently for the first time, that the *O'Brien* test is not applicable because *Claiborne* and *Noerr* exhaust the First Amendment's concern for expressive conduct that may adversely affect competition. FTC Br. at 25-28. But nothing in either *Claiborne* or *Noerr* precludes an intermediate level of scrutiny for conduct that does not fall within the specific parameters of the exemptions set forth in those decisions. Indeed, *Claiborne* recognized the applicability of the *O'Brien* test to expressive boycotts, 458 U.S. at 912 & n.47, as have other courts and commentators that have considered the issue.[14]

Rather than constituting a "novel and untenable exception," FTC Br. at 11, a requirement that competitive harm be demonstrated by exacting proof represents a logical application of established First Amendment principles. In diverse areas of substantive law, this Court has held that the First Amendment may require heightened proof of the elements of a legal violation before expression may be penalized. In *Claiborne,* for example, the Court held that the presence of expressive conduct "imposes restraints on the grounds that may give rise to [tort] damages liability and on the persons who may be held accountable for those damages." 458 U.S. at 916-17; *see also Roaden* v. *Kentucky,* 413 U.S. 496, 504 (1973) (seizures of allegedly obscene books or films must meet higher standard of Fourth Amendment reasonableness than seizures of non-expressive contraband); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) (heightened evidentiary showing required in libel actions involving public officials). Similarly, when a court in an antitrust case is faced with ambiguous evi-

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[14]*See, e.g., Osborn, supra,* 499 F. Supp. at 557; Note, *A Market Power Test for Noncommercial Boycotts,* 93 Yale L.J. 523, 532 & n.52 (1984) [hereinafter *"A Market Power Test"*]; Comment, *Protest Boycotts Under the Sherman Act,* 128 U. Pa. L. Rev. 1131, 1144 (1980); Note, *Political Boycott Activity and the First Amendment,* 91 Harv. L. Rev. 659, 671 (1978) [hereinafter *"Political Boycott Activity"*].

dence of conspiracy, the First Amendment may require a clearer showing of actual agreement than would otherwise be required.[15]

In each of these situations, heightened evidentiary burdens serve the function of guarding against insufficiently justified infringements of expressive rights. The market power requirement, as articulated by the court of appeals, does this and nothing more.

b. The Commission contends that a market power requirement would significantly impair its enforcement program. But as the Commission itself notes, expressive boycotts have been "infrequent." FTC Br. at 33. In light of the paucity of cases, the Commission's protestation that a market power requirement would impose onerous new administrative burdens must be viewed with skepticism.

The Commission attempts to explain away the infrequency of expressive boycotts with the observation that "most people have considered them illegal *per se*." FTC Br. at 33. This assertion lacks any evidentiary or legal support, however. The only "cases" cited by the Commission are FTC consent agreements, each of which was entered without any adjudication of the merits, and each of which expressly disavows any admission of liability—much less *per se* liability.[16] At least so far as the courts have been concerned, rule of reason rather than *per se* treatment has been

[15]*See Market Power Test, supra,* 93 Yale L. J. at 525; *Political Boycott Activity, supra,* 91 Harv. L. Rev. at 689. Indeed, the administrative law judge below appeared to recognize this principle in rejecting complaint counsel's suggestion that the mere discussion at SCTLA meetings of appropriate fee levels to be included in proposed legislation constituted an illegal conspiracy. 107 F.T.C. at 554 n.218.

[16]FTC Br. at 33 & n.28. The Commission is no doubt correct, however, in its assumption that if a *per se* rule *were* established, it would have a substantial deterrent effect upon collective efforts to convey an opinion on issues having mixed political and economic implications. Indeed, a *per se* rule would raise the specter of criminal prosecutions under the Sherman Act for joint *political* activities by competitors.

the nearly universal mode of analysis for boycotts with an expressive component. *See, e.g., United States* v. *North Dakota Hospital Association,* 640 F. Supp. 1028 (D. N.D. 1986); *Osborn, supra,* 499 F. Supp. 553. The Commission itself saw fit to apply the rule of reason in *In re Michigan State Medical Society,* 101 F.T.C. 191 (1983). Thus, a more plausible explanation for the scarcity of case law in this area is that antitrust enforcers, in the exercise of sound discretion, have generally opted to stay out of the political arena. *See Political Boycott Activity, supra,* 91 Harv. L. Rev. at 678-79.[17]

3. The Commission contends that, even if a *per se* rule is not applied, it should not be required to prove market power because adverse competitive effects are demonstrated by the mere fact of the rate increase. Relying upon *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 460-61 (1986), the Commission notes that "'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

As the court of appeals explained, however, "[t]he normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena." 856 F.2d

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[17]The Commission suggests that a market power requirement for expressive boycotts would open the floodgates to boycotts of Medicaid by health care providers. FTC Br. at 33-35, 43. The Commission's concerns are totally unwarranted, however. In addition to the fact that such boycotts have rarely occurred, *id.* at 33, a market power requirement fully protects the Commission's legitimate interests in policing competition. The Commission's argument simply begs the question whether expressive boycotts are, in all cases, damaging to competition. If they are not, then the prospect (unlikely in our view) of an increased number of such boycotts occurring in the future cannot justify *per se* treatment. Notably, the AMA counsels its members and state and local medical societies to avoid activities that could be characterized as a collective refusal to deal with governmental or private payors. *See, e.g.,* American Medical Association, *Collective Negotiation and Antitrust: A Guide for Physicians* (1989).

at 251. Given the political context in which the boycott occurred, political rather than economic power may be the "more explanatory variable" for the increase in CJA rates. *Id.* Indeed, the record shows that the SCTLA boycott was met with considerable sympathy by non-CJA lawyers, the media, and the public at large. It is therefore quite plausible that the SCTLA's efforts succeeded because District officials, acting in accordance with the perceived will of their constituents, decided to improve the amount or quality of services provided under the CJA program.[18]

One thing is certain, however: If the boycott participants lacked market power they could not have exerted any significant economic pressure on the District to increase reimbursement rates. The conclusion would then be inescapable that the increase was the product of "the rough and tumble of municipal politics," 856 F.2d at 252, rather than economic coercion. As such, the boycott could not be suppressed consistent with either *O'Brien* or *Noerr*. It is therefore essential that the Commission assess the lawyers' market power before pronouncing their conduct anticompetitive.

Moreover, if on remand the Commission determines that the lawyers had market power, its inquiry should not end. The Commission still must decide whether that power was significant enough to justify the suppression of their expressive activities. 856 F.2d at 252-53. Because the First Amendment requires exacting proof that an expressive boycott in fact harmed competition, the SCTLA's activities should not be condemned unless any market power that the lawyers possessed was sufficient to cause serious competitive injury. In addition, the SCTLA still must have an

[18]Alternatively, the District may have made a political choice to provide CJA lawyers with a better standard of living and higher professional standing than would otherwise be available to them. Such a choice would undoubtedly be within the District's powers. *See Parker* v. *Brown*, 317 U.S. 341 (1943). When the market provides certain economic actors a return far below the perceived social value of their services, it is not unusual for legislation to attempt to fill the gap.

opportunity to demonstrate that the increase in rates resulted from persuasion, for "[t]he fact that market conditions may favor" the exercise of market power "does not imply that a boycott constitutes unlawful economic coercion rather than bona fide political expression." Hurwitz, *supra*, *Abuse of Governmental Processes*, 74 Geo. L.J. at 115.

Finally, given the possible procompetitive benefits of the SCTLA's activities, the Commission should consider on remand whether such benefits outweighed any adverse competitive effects. In making this analysis, the Commission should take into account the informational value of the boycott. *See* pp. 18-19, *supra*. The Commission must not simply assume—as it does now—that "payment of a higher legal service price" constitutes an "adverse effect of the boycott." FTC Br. at 44. If the District, based on the information generated by the boycott, chose to purchase a higher quantity or quality of CJA services, an increase in expenditures would not represent an adverse competitive effect. *See* R. Bork, *The Antitrust Paradox* 296 (1978). On the contrary, such an increase would epitomize the working of competition to facilitate choice and maximize consumer welfare.

In sum, the First Amendment requires at a minimum that an expressive boycott not be condemned under the antitrust laws absent rigorous proof of a violation. Here, the Commission failed to demonstrate the most fundamental element of a Sherman Act §1 violation, that of competitive harm. The court of appeals therefore correctly held that the Commission had not met its burden.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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